not prejudiced by significantly higher costs that are the direct result of governmental assessments.[124]

Congress' goals can be realized only through rules that permit cable operators to provide equivalent and enlightened review by consumers of all governmentally-imposed costs on their bills.[125] Several parties oppose this position, and do so by relying solely on language contained in the House Report.[126] In fact, a different itemization provision adopted by the Senate was actually enacted by Congress, and thus the House Report is irrelevant.[127] Most importantly, regardless of any legislative history, the statutory language is clear on the right of a cable operator to show these costs in a separate line item. For example, the proposition made by the Minnesota Cities is blatantly inconsistent with the plain language of the statute, and contravenes Congressional intent as well.[128] The Minnesota Cities, relying on language contained in the House Report, claim that a subscriber bill may not read:

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[124]See Fleischman and Walsh Comments at 85.

[125]Accord Continental Comments at 75.

[126]See Minnesota Cities Comments at 26-27; NATOA Comments at 91-92; NYSCCT Comments at 29-30; see also Notice at ¶ 175 (Commission proposes to reflect Congressional intent, as set forth in the House Report, in implementing rules pursuant to Section 622(c)). The House language on itemization was not, however, the language adopted by Congress. Rather, Congress adopted the Senate version of the provision. Conf. Report at 84.

[127]See Conf. Report at 84.

[128]Compare Minnesota Cities Comments at 26-27 with 47 U.S.C. § 542(c)(1).

Bill For Services	$30.00
Franchise Fee	1.50
Total Bill	$31.50[129]

According to the Minnesota Cities, the evidence of governmental costs should be disguised and hidden in ways that will lessen the consumer's likelihood of understanding that significant charges are imposed not by the cable operator but by the government. The Minnesota Cities would have the bill contain one total charge followed by an asterisk which notes that part of the total bill is attributable to a certain percent franchise fee of a given percentage. Such an approach would leave the consumer in the dark as to the actual amount, in dollars and cents, of the total bill that is added by the franchise fee.[130]

The Minnesota Cities' proposition is wholly unsupported by the language of the provision itself, which clearly states that franchise fees and other governmentally-imposed cable service-related fees may appear on a subscriber bill "as a separate line

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[129]Minnesota Cities Comments at 27. Some cities would claim that, assuming a five percent franchise fee, the foregoing example may understate the amount due to the city; they argue that five percent should be paid on the total bill, not on the $30.00 service charge. Issues relating to franchise fee calculation, however, need to be separated from the fundamental right to itemize. In any event, such concerns could be addressed as follows:

Cable Service	$30.00
Franchise Fee	1.58
Total Bill	$31.58

Under this example, the itemized franchise fee is shown as five percent of the total bill.

[130]See id. at 27.

item."[131] The statutory language does not limit disclosure of such fees to footnotes or fine print at the bottom of the bill. Rather, each relevant government assessment that results in higher costs to the public should appear on a separate line below the cable operator's service rate,[132] but above the total, in the interest of full disclosure to the consumer. Therefore, the Minnesota Cities' example of how a bill may not read is precisely how an itemized subscriber bill may, and should, read.[133]

NATOA's assessment of the limited types of governmental costs that may be identified and itemized pursuant to Sections 623(b)(4) and 622(c) is also patently incorrect.[134] NATOA asserts that the only costs addressed in Section 623(b)(4) are "costs attributable to PEG franchise requirements, and that it does not include costs attributable to franchise requirements in general."[135] The Commenters strongly disagree, and our position is borne out by the statutory language in Section 623(b)(4), which states in no uncertain terms that the Commission shall

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[131]47 U.S.C. § 542(c). The term "line item" is one commonly used by Congress, and should be interpreted as utilized in the legislative process. For example, a "line item veto" means that items in a bill may be vetoed line by line without affecting other provisions of the bill. See Black's Law Dictionary 1403 (5th ed. 1979). Thus, under Section 622(c), government fees should appear as "separate line items" and not hidden in footnotes or buried in a "legend" which does not clearly disclose the incremental contribution of these charges to the total bill.

[132]See MFA Comments at 23; Continental Comments at 79; Time Warner Comments at 109-10; see also City of Des Moines, IA Comments at 1.

[133]Accord Continental Comments at 79.

[134]NATOA Comments at 52.

[135]Id.

prescribe regulations that include "standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise."[136] Furthermore, the plain language of Section 622(c) permits the itemization of "any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber."[137]

While NATOA does not want consumers to be aware of relevant government costs itemized on a cable subscriber's bill as the statute authorizes, it supports expansive disclosure of several other types of costs on the subscriber's bill that are not provided for by any statutory provision, nor even discussed in any legislative history.[138] These suggestions should also be rejected.

Finally, the City of Mission Viejo, CA seeks to confer editorial control over billing itemization on franchising authorities so that they can "ensure editorial accuracy on the billing statements."[139] This is blatantly contrary to Congress' intent as demonstrated by the plain language of Section 622(c),

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[136] 47 U.S.C. § 543(b)(4) (emphasis added).

[137] Id. at § 542(c) (emphasis added); contra NATOA Comments at 52.

[138] NATOA Comments at 92-93 (the proposed costs for disclosure include programming costs, operating costs, profitability, payments on the cable system's debt service, and any other items a franchising authority believes are appropriate to itemize in order to accurately reflect the costs in a subscriber's bill).

[139] City of Mission Viejo, CA Comments at 2.

which states that "[e]ach cable operator" may identify government-imposed assessments as a separate line item on each subscriber bill.[140] By using this language, Congress gave absolute discretion to cable operators to itemize franchise fees and other government assessments so that subscribers would know what portion of their monthly cable bill was imposed by the government, separate and apart from the cable service charges. Congress carefully chose the language it enacted in Section 622(c), and did not intend to give franchising authorities editorial control over cable operators' billing statements. Therefore, the Commission should not implement rules permitting franchising authorities to have such editorial control because such rules would be contrary to Congress' intent as manifested in the statute.

As the Commenters have asserted, subscriber bill itemization, as proposed in the plain language of Section 622(c), is a highly effective check on runaway government-imposed levies and assessments on cable subscribers which heretofore have been largely hidden from public scrutiny. Unless the public can see the breakdown between cable operator and governmental charges related to cable service, it will never know who is responsible for those charges, and it will continue to question a cable operators' higher rates when, in fact, certain significant costs are solely controlled by their elected representatives.[141] The presentation of these charges, each as a separate line item below

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[140] 47 U.S.C. § 542(c) (emphasis added).

[141] See Continental Comments at 79.

the service charge item, is precisely the means by which the subscriber will have the ability to veto such charges by petitioning for the elimination of such costs at the local or state government level.[142]

F. Implementation and Enforcement.

The Commenters urge the Commission to adopt implementing and enforcing regulations that preserve the statutory directive in Section 623(b)(5)(A) that cable operators "implement" and franchising authorities "enforce" basic rate regulation. A benchmark approach to basic rates will allow the cable operator to implement initial basic rates that are consistent with those benchmarks. Cable operators may also implement a subsequent rate increase after it provides thirty days notice to the franchising authority. The franchising authority enforces compliance with the benchmark of basic rates by rendering a decision on whether the cable operator's rates are consistent with the benchmark. If the franchising authority and the cable operator are in dispute, then the FCC may be called upon to resolve the dispute. After the thirty-day notice period, rate increases are automatically implemented by the cable operator, in accordance with the

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[142]A statement of each governmental cost in a line item directly under the cable operator's charge as a portion of the total bill will make it clear to the FCC why a particular rate may be in excess of the benchmark rate and thereby make it easy for the FCC to conclude the cable operator's rates are not unreasonable. Moreover, the local or state government, which seeks a rollback of a rate above the benchmark will vividly see how much of that rollback proportionately will have to be taken from each government assessment since these lines are commonly imposed on a percentage of the operator's revenue.

statute.[143] Within the thirty-day period, franchising authorities may decide that the rate increase is not warranted under the benchmark and, if it cannot resolve the dispute with the cable operator, file a complaint with the FCC.

The Commenters find that the thirty-day review of rate increases is intended to allow the franchising authority a brief but adequate period of public review; if the franchising authority does not decide to oppose the rates at the end of thirty days then it cannot later reevaluate the reasonableness of the rate increase.[144] The FCC's proposal in paragraph 80 of the Notice of a 120-day review period for rate increases is inconsistent with the 1992 Cable Act,[145] and would be completely unnecessary under a benchmark regulation approach. The alternative suggested in paragraph 82 of the Notice will needlessly slow the process of rate review and prevent new cable services from being implemented in a timely fashion.

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[143] 47 U.S.C. § 543(b)(6). Paragraph 83 of the Notice proposes an analogous approach, although Congress declined to provide for refunds of basic rate increases subsequently found not to be reasonable. Refunds are not stated as an enforcement mechanism for basic service rates. 47 U.S.C. § 543(b)(5). This is in contrast to enforcement by refund for cable programming services upon a meritorious complaint. Id. at § 543(c)(1)(C). It must be presumed that Congress intentionally rejected the power to order a refund as a mechanism for enforcement of basic service rates.

[144] In addition, where a franchising authority has already approved a basic rate schedule it is estopped from judging the reasonableness of the rate, even if the rate exceeds FCC benchmark regulations.

[145] 47 U.S.C. § 543(b)(6) clearly states that the cable operator must give thirty days, not 120 days, advance notice of a basic rate increase.

The same thirty-day period should also apply to the franchising authority's review of initial basic service rates.[146] The cable operator should be required to submit its initial basic rates, after franchising authority has informed the cable operator in writing that it has been granted FCC certification to regulate basic rates. Once the thirty-day review period has expired, the franchising authority shall be presumed to accept the reasonableness of the initial rates and shall not be permitted to enforce any subsequent decision that the initial rates were unreasonable or not within FCC benchmarks.

Some parties suggested that the period for review of initial basic rates and increases in basic rates should be extended beyond a thirty-day review period.[147] The franchising authority should be limited to thirty days of review to make its decision. There is no reason why a franchising authority that is presumably already familiar with existing basic rates would need more than thirty days after it has been certified to give the public an opportunity to comment and decide if the basic rate is acceptable, especially if this review simply a comparison of the

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[146]Under a simple benchmark approach, as advocated by Commenters, the initial basic rates may be evaluated simply by a comparison of FCC benchmarks with the operator's basic service rates. This same process will be undertaken to review basic service rate increases and so their is no reason to allow more than thirty days to review initial basic rates. Therefore, the Commenters disagree with the proposal in paragraph 80 of the Notice that the franchising authority should be permitted 120 days to make a decision on initial basic rates.

[147]Austin, TX Comments at 60 (suggests an alternative that an added 120 days may be afforded for rate increases, in addition to the 30-day period); NATOA Comments at 56-59; Coalition of Municipal and Other Local Governmental Franchising Authorities Comments at 20, 21.

benchmark rate with the cable operator's rate. In addition, the statute clearly requires that the cable operator give only thirty-day notice prior to implementing a basic rate increase.[148] Extending these time limits only serves to increase the formality and cost of the rate review process and make it more difficult to implement programming and service improvements.

The franchising authority has the power to enforce by ordering a reduction after the basic rate has been implemented by the cable operator. Since the cable operator is given the power to implement rates, it alone has the power to set rates. It is appropriate to leave rate setting to the cable operator since it can most efficiently alter its service and price configurations.[149]

Several parties assert that franchising authorities should have the power to set rates and order refunds.[150] These parties want to extend the franchising authority's power to enforce beyond its statutory limits; the power to enforce does not include the power to order a refund[151] and the power to set rates must be left with the cable operator if it is to implement those rates.

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[148]47 U.S.C. § 543(b)(6). Further, the statute preempts any rate increase notice requirements longer than thirty days.

[149]An explanation by the franchising authority of its rate reduction decision should be required since this will expedite consensus between the two parties.

[150]CFA Comments at 156; Austin, TX Comments at 58-59; NATOA Comments at 65; Coalition of Municipal and Other Governmental Franchising Authorities Comments at 20, 25.

[151]See supra note 143.

The Commenters agree with the FCC's proposal that formal rate hearings are not necessary and that the franchising authority should be required to issue a written explanation of its decision.[152] Formal hearings would be inconsistent with the expedited nature of the rate review process and add to the costs of regulation for both the franchising authority and the cable operator, contrary to the intent of Congress.[153] Requiring cable operators to make a formal showing that its rate proposal conforms to FCC regulations, as proposed by NATOA,[154] would also add to administrative burdens. As long as the cable operator's rate is within the benchmark regulations then it should not have to overcome a presumption of unreasonable rates.[155] In addition, some parties assert that the franchising authority should be able to require the cable operator to disclose to it even proprietary information to justify a rate proposal.[156] Information disclosure

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[152]Notice at ¶ 85.

[153]The Commission should seek to reduce administrative burdens. 47 U.S.C. § 543(b)(2)(A); procedures should promote expeditious resolution of disputes between cable operators and franchising authorities. Id. at § 543(b)(5)(B).

[154]NATOA suggests that the cable operator prove its rate proposal by a preponderance of the evidence. Comments of NATOA at 61. NATOA, in effect, wishes to turn what should be an expedited administrative proceeding into an arduous civil trial.

[155]Obviously, if the franchising authority questions the reasonableness of the basic rate during its review, when the initial rate is reviewed after adoption of these regulations or during review of any subsequent basic rate increases, the cable operator is free to support its rate. To presume that the rate is unreasonable at the outset, however, is contrary to the statutory structure allowing cable operators to implement basic rates and franchising authorities to enforce, but only if the basic rate is found not to be reasonable.

[156]NATOA Comments at 61-62; Austin, TX Comments at 60.

would be irrelevant if the Commission adopts a simple benchmark approach as advocated by the Commenters.

Disputes between cable operators and franchising authorities regarding basic rates should be resolved by appeal to the FCC.[157] Local courts should not be compelled to deal with the many complicated rate regulation issues that will likely arise and the crowded court dockets cannot accommodate Congress' mandate for expeditious resolution of disputes.[158] Further, FCC resolution will provide consistent national precedent and avoid repeated litigation of the same issues in state and federal courts of different jurisdictions.

Paragraph 88 of the Notice asks for comment on the role of basic rate regulation by the FCC where it asserts primary jurisdiction because it has revoked or disallowed a franchising authority's certification.[159] The Commenters assert that Congress intended for the FCC to act as the local franchising authority would act.[160] Thus, all procedures that apply to the franchising authority for the regulation of basic cable service, e.g., thirty days' prior notice for a rate increase, should apply when the FCC asserts its limited jurisdiction.

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[157]Some parties representing consumer and municipal interests agree with this position. CFA Comments at 157; NATOA Comments at 66. The Commenters urge that the FCC take a de novo standard of review of appeals. Cf. NATOA Comments at 66-67.

[158]47 U.S.C. § 543(b)(5)(B).

[159]FCC jurisdiction is proper under 47 U.S.C. § 543(a)(6).

[160]See 47 U.S.C. § 543(b)(6) ("the Commission shall exercise the franchising authority's regulatory jurisdiction").

Lastly, the Commenters agree with the tentative conclusion of paragraph 89 of the Notice regarding notice to subscribers of the availability of the basic service level either within ninety days or three billing cycles after the rules take effect. Similarly, such disclosure should be included in oral or written sales information provided to subscribers prior to installation.[161] It would be superfluous to repeat such information in the actual installation, since the customer has already selected the desired service level. The Commenters do not agree, however, with the proposal in paragraph 84 of the Notice that cable operators must provide subscribers with thirty days' notice prior to a rate increase.[162] The franchising authority and the cable operator are free to agree to include such a notice requirement in the franchise agreement.

III. CABLE PROGRAMMING SERVICE REGULATION

A. Non-Basic Rate Formula - The "Bad Actor" Test.

Many of the franchising authorities and consumer groups filing comments in this proceeding argue that cable programming

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[161]Austin, TX Comments at 60 agree with this position.

[162]The Commission bases this proposal on the language in 47 U.S.C. § 543(a)(3)(C) that, as a condition of certification, the franchising authority must promote procedures for the "reasonable opportunity for consideration of the views of interested parties." Thus, the franchising authority, not the cable operator, should bear the burden of informing subscribers. Further, the requirements in Section 623(b)(5)&(6) specify the notice requirements of the cable operator but do not include a requirement to give prior notice of a rate increase to all subscribers. Notice to subscribers regarding changes in rates and programming is an issue to be resolved pursuant to the contractual franchise agreements between cable operators and franchising authorities. _Cf_. 47 U.S.C. § 544(h).

service rate regulation should be modeled along similar or even identical lines as basic service regulation.[163] Some regulators have argued that both basic and non-basic rate regulation should be cost based[164] or subject to rate of return regulation.[165] Indeed, one consumer advocacy group goes even so far as to request the FCC to adopt an interim, single "global" formula that applies both to basic service and the thirty most popular national cable networks.[166] These overly zealous regulatory approaches must be rejected for the following reasons.

Initially, both the language of the statute and its legislative history unquestionably require a different and more flexible approach to the regulation of non-basic rates than for basic service rates. For example, while the FCC's basic rate formula must take into account the costs of providing and

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[163] See, e.g., Austin, TX Comments at 63; Schaumberg, IL Comments at 10.

[164] See State of New Jersey Board of Regulatory Commissioners Comments at 21-23; CFA Comments at 84-85.

[165] Austin, TX Comments at 63.

[166] CFA Comments at 94-97. CFA argues that its "global formulaic" is required in order to prevent operators from evading rate regulation by retiering popular cable programming services off of the basic tier. This argument, which is found in different forms in the comments of various franchising authorities and regulatory agencies, fails to recognize: (1) the regulated content implications of such an approach; (2) that from a logistical standpoint such cable programming historically has been provided on service tiers above the basic level in many systems; and (3) that those systems that offer large basic tiers have done so because of deregulation. See Notice of Proposed Rulemaking in MM Docket No. 90-4, 5 FCC Rcd 259, at ¶ 16 (1990). CFA's global formulaic approach clearly ignores the fact that Congress has defined the compositional requirements for the basic tier and specifically gave cable operators the discretion to decide whether or not to provide cable networks on the basic tier. 47 U.S.C. § 543(b)(7), (8).

revenues derived from the basic tier, the Commission is specifically directed to look beyond such costs in promulgating its non-basic rate benchmark.[167] Furthermore, unlike basic rate regulation which is to be administered locally pursuant to FCC standards, the statute requires the rates for cable programming services to be reviewed by the FCC itself only in individual cases where a showing has been made that the rate is unreasonable.[168] The legislative history likewise makes absolutely clear that, with respect to cable programming service regulation, even more than with basic service regulation, Congress sought to balance the desire for promoting a greater diversity of service against the additional revenue needed to support the development of such new services and concluded that the regulation of cable programming service tier rates was warranted only as a failsafe mechanism to "rein in the renegades" in those very rare individual instances where a particular rate is demonstrated to be abusive or unreasonable.[169]

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[167] Compare 47 U.S.C. § 543(b)(2)(C) with § 543(c)(2).

[168] 47 U.S.C. § 543(c)(1)(A). In this regard, the position advocated by NATOA that would allow the Commission to delegate to franchising authorities the right to determine in the first instance whether a non-basic rate is unreasonable and would require the Commission to uphold that decision unless it was determined to be arbitrary and capricious must be rejected. NATOA Comments at 72-74. See also NYSCCT Comments at 11-12. Any such procedure is contrary to Section 623(a)(2) of the statute which allows only basic rates to be regulated locally and requires the Commission to review cable programming service rates in individual cases where a complaint makes a minimum showing of unreasonableness.

[169] See House Report at 86; 138 Cong. Rec. E1033 (April 10, 1992) (statement of Rep. Markey); 138 Cong. Rec. S561 (1992) (statement of Sen. Inouye); H.R. Rep. No. 682, 101st Cong., 2d Sess. 82 (1990).

A number of other practical considerations also justify application of a more lenient standard with respect to non-basic rates. The statute requires that the regulated basic tier be purchased in order to access any other tier of programming on the system. If cable networks are offered as part of this basic tier, they will be regulated under the benchmark approach adopted by the Commission for basic rates. Moreover, a less lenient basic rate formula which seeks to keep basic rates low in relation to the services offered on the basic tier will also act as a check on the rates charged for non-basic tiers. If the price differential between basic service and cable programming tiers becomes too great, subscribers may choose to downgrade their service to the basic tier. The fact that the statute requires cable operators who are technically capable of doing so to make premium services available to basic only customers further ensures that the prospect of tier migration from non-basic to basic tiers will keep non-basic prices in line.[170]

An overly stringent non-basic rate regulation formula will also severely impact program quality, especially to the extent that such a formula is based on historical costs as is advocated by CFA. A rate benchmark based on historical costs adjusted upwards by a consumer price indicator does not take into account the fact that cable program quality has increased dramatically and, thus, costs have risen much more rapidly than the overall consumer price index. These cost increases are largely due to the increased demand for original programming by cable networks

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[170] 47 U.S.C. § 543(b)(8).

that have increased their ratio of original to acquired programming significantly over the past ten years. If the non-basic rate formula is implemented with the goal to depress non-basic rates rather than simply reining in the small minority of so-called renegades, there will be little financial incentive for cable operators to support new or high quality existing programming services. In the end, an approach to non-basic rates that attempts to mirror the basic rate formula will reduce rather than foster program diversity in violation of Congress' clearly articulated purpose.[171]

The Commission must also decline the invitation of certain regulators and consumer advocates to extend rate regulation to per-channel and per-program services which are offered on a completely unbundled basis when those services are also offered as part of a package discount or package of multiplex services. Essentially, some regulators advocate that any time two or more per-channel or per-program services are offered together for a single price, the Commission must subject them to regulation as a service tier.[172] Indeed, the comments filed by NATOA advocate this position "regardless of whether the rate for such tier is simply the total of all the per-channel charges for such service, or a higher or lower rate than the total rate a subscriber would pay if such services were purchased individually."[173]

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[171]Pub. L. 102-385, 106 Stat. 1460, §§ 3(b)(1)-(3).

[172]CFA Comments at 136; NATOA Comments at 78-79.

[173]NATOA Comments at 78.

Initially, the Commission must acknowledge that the distinction between a service tier, which is subject to regulation, and a service package, which is not, is the fact that the services offered on a tier may not be purchased individually while each of the elements of a package are priced and available for purchase separately.

It makes no sense to allow a franchising authority to regulate the rates for a package of services, for example a package of three a la carte services offered on a discounted basis for $27.00, when it cannot regulate the $10.00 monthly rate charged for any one of those services on an individual basis. It is hard to imagine any instance where a cable operator would charge a higher price for the package than it charges for the individual components as suggested by NATOA, since no subscriber would pay more for a package of services than it would to purchase the services individually. Cable operators have an incentive to offer discounted packages in order to maximize the distribution of video programming in the most economically efficient manner.[174] Any extension of rate regulation to cover package discounts or multiplex packages would inhibit marketing

[174]It should be noted that the same analysis holds true whether the package is comprised wholly of services offered on a per-channel basis, whether discounts are provided for purchase of successive program tiers or whether the package consists of some combination of the two. Thus, where an operator offers a basic service tier for $10.00, a cable programming service tier for $15.00, and per-channel premium services for $10.00 each, there is no reason why the operator should not be able to offer a package consisting of the basic tier, the non-basic tier and one premium service for $33.00 rather than the total of the individual components which would be $35.00.

innovations, reduce program diversity and require subscribers to pay more for the programming which they do choose to purchase.

B. Procedural Issues.

The 1992 Cable Act requires the Commission to establish a minimum showing that will be required to trigger Commission consideration of the complaint.[175] As noted in their initial comments, the Commenters believe that the minimum showing for any rate complaint filed with the Commission must be sufficient to allow the Commission to conclude, after review of the complaint and answer, that the rates are so far beyond the norm as to be unreasonable. Where a challenged rate for cable programming services falls within the allowable safe harbor of any benchmark established by the Commission, the complaint should be dismissed. On the other hand, where a complaint on its face alleges facts sufficient to show that the rate exceeds the safe harbor established by the FCC, the burden would then shift to the cable operator to demonstrate by cost showings or otherwise that its rates are not unreasonable despite the fact that they exceed the benchmark.

Certain parties have argued that the Commission should establish a complaint procedure that would allow any subscriber to merely allege that a rate could be unreasonable and that such an allegation without anything more would then shift the burden to the cable operator to demonstrate, on a cost of service or

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[175] Id. at § 543(c)(1)(B).

other basis, that its rates are not unreasonable.[176] This approach must be rejected for a number of reasons.

First, if a subscriber's complaint alleging that rates might be unreasonable was sufficient to force cable operators to justify their rates through a cost-of-service analysis, this would render any benchmark established by the FCC meaningless. The whole purpose in utilizing a benchmark approach to rate regulation is to establish in an administratively efficient manner a test for determining those isolated instances where a cable operator's rates are unreasonable. Accordingly, any complaint must at minimum allege facts sufficient to enable the Commission to determine whether the benchmark has been exceeded. Without such a showing, the complaint should be dismissed.

Second, given the fact that the FCC is likely to receive at least one complaint whenever a cable programming service rate increase is announced, any procedure that would fail to weed out frivolous complaints and require analyses for every complaint filed not only ignores the statutory mandate for a rate regulation approach that could be efficiently administered at low cost, but also would strain Commission resources far beyond their present capacities and could, in some instances, result in more stringent rate regulation of cable programming services than that imposed for basic service.[177]

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[176]See, e.g., CFA Comments at 139-40; NATOA Comments at 74.

[177]As mentioned previously, the Commission does not have authority under the statute to accept the invitation of some parties which would allow local or state franchising authorities to judge non-basic rates in the first instance.

Third, the statute expressly allows the Commission to "adopt formulas or other mechanisms" to carry out its statutory obligations.[178] The benchmark approach advocated by the Commenters takes into account cost factors such as system size, density, construction requirements and labor indices without having to employ either industry averages or actual individual system costs for each capital and operational item to determine a benchmark rate. Accordingly, only in cases where the benchmark rate is exceeded should cable operators be required to rely on cost of service to justify any rate increase.

Finally, in applying any such benchmark formula, the Commission must be careful to recognize that to the extent that the benchmark is based on past costs and revenues, it would not account for the new regulatory costs imposed by the 1992 Cable Act in such areas as technical and customer service standards, retransmission consent, implementation of tier buy-through, and the like. Such costs must be considered by the Commission in meeting its statutory obligation either in the form of cost pass-throughs or in factoring these costs into any annual rate inflator.

IV. SMALL SYSTEM RELIEF

In their initial comments, the Commenters demonstrated the absolute importance of the Commission's providing regulatory relief for small cable systems to protect these largely rural

[178] 47 U.S.C. § 543(b)(2)(B).

operators from unnecessary, costly and burdensome regulation.[179] In order to fulfill Congress' particularized mandate to limit the "administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers," the Commenters pointed out that the most certain method for the Commission to reduce such burdens and costs would be to completely exempt small systems from basic rate regulation.[180] This concept is supported by various parties who note that small systems are often subject to significantly higher costs per subscriber because of the low density of homes passed, higher programming costs, higher proportionate costs of equipment and, in addition, suffer from limited sources of additional income.[181] As the Commenters noted, the legislative history of the 1992 Cable Act states that basic rate regulation as a means of curtailing the abusive practices of certain cable operators was specifically not directed at the nation's small cable systems, which have not engaged in such practices.[182] In light of these factors, therefore, it would be reasonable to provide small cable systems with full relief from the costs and burdens associated with basic rate regulation by means of a small system exemption.

Nevertheless, in the absence of a complete exemption of small cable systems from basic rate regulation, the concept of

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[179]Fleischman and Walsh Comments at 110-17.

[180]Id. at 115.

[181]See Fanch Communications and Mission Cable Co., L.P. Comments at 7; Consortium of Small Cable Operators Comments at 4.

[182]Fleischman and Walsh Comments at 115 (citing 138 Cong. Rec. H6525-26 (July 23, 1992) (statement of Rep. Bereuter)).

flexible, or separate, benchmarks for small cable systems, as proposed by the Commenters, also enjoys wide support among other commenting parties.[183] In particular, the incorporation of a density factor into the rate regulation benchmarks is cited time and again as critical in customizing the benchmarks to more closely reflect the higher costs associated with operating small cable systems.[184] Under either the flexible or separate benchmark approach for small cable systems, the Commission would appropriately take into consideration the variety of operational and cost factors unique to small cable systems and tailor the rate benchmarks accordingly.

Ultimately, the manner in which the Commission chooses to measure small cable systems is as important as whether the Commission exempts such systems from basic rate regulation entirely, or merely provides enhanced protection for small systems from the burdens associated with such regulation. In crafting regulations to implement Section 623(i) of the Act, the Commission should be cognizant of the fact that both rate regulation and the definition of effective competition under the 1992 Cable Act are based on conditions in a cable operator's franchise area, not on conditions in the area a cable operator serves from a single integrated headend. As explained by the Commenters in their initial comments, measurement of subscribers

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[183]See Coalition of Small System Operators Comments at 12-13; Alaska Cablevision Comments at 3; Star Cable Associates Comments at 6; Community Antenna Television Association, Inc. ("CATA") Comments at 17-20.

[184]See Fleischman and Walsh Comments at 116; CATA Comments at 17-20; Star Cable Associates Comments at 6.

on other than a community unit or franchise area basis will be a huge disincentive to technological innovation associated with the fiber optic interconnection of franchise areas and the elimination of outdated headends.[185] Where consolidation of headends causes the number of a system's subscribers to rise above the 1,000 limit, measurement on a system-wide basis will have the undesirable effect of both discouraging such an upgrade of service and technology and of thwarting Congressional intent by subjecting to unnecessary regulatory burdens what is still, in financial and operational terms, a small system. It is crucial, therefore, that any test devised by the Commission for measuring small cable systems and according them regulatory relief be based on a community unit, rather than system-wide, approach.

V. GEOGRAPHICALLY UNIFORM RATE STRUCTURE AND DISCRIMINATION

Section 623 should not be applied in a manner that injures consumers by limiting the cable operator's ability to tailor its pricing to various competitive environments. In their comments on "geographically uniform rates and discrimination," the Commenters argued three main propositions: (1) that any geographic rate uniformity (either in level or structure) imposed on a cable system should accommodate differences in governmentally-imposed costs between the territories, (2) cable operators should be free to negotiate individual contracts with

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[185]Fleischman and Walsh Comments at 112-14.

MDU[186] owners, and (3) a cable operator should be free to meet the price of a competitor that elects to contest less than all of a cable operator's franchised territory. The Commenters also agreed with the preliminary view of the Commission that Section 623(d) does not purport to regulate a cable operator's ability to charge different rates to different kinds of customers, *e.g.*, hotels and motels, trailer parks and other bulk customers, rather it regulates a cable operator's geographic, not customer-based, pricing practices.

Most other thoughtful commenting entities, regardless of whether they were cable operators or regulators, agreed with the Commenters' first proposition -- that governmentally-imposed cost differences should be recognized in any geographically-uniform price regulation scheme even when different franchise territories are served by a single technically-integrated cable system.

One state regulatory agency, expressing its view that rates should be uniform only within a franchise area, framed the argument this way:

> Creating uniform pricing over a geographic area that extends beyond the franchise area would dramatically depart from the structure of current cable regulation. If Congress intended to make such a dramatic change in the regulatory oversight of cable, it is doubtful that this result would have been accomplished with a single word choice deep

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[186]By "MDU," the Commenters mean to include not only rental apartment buildings, but also condominiums, trailer parks and so-called "private communities," all of which traditionally have been served by SMATV and MDS as well as by cable. The common element in these situations is that either the landlord, the developer, or the homeowners' association negotiates directly with the multichannel provider for the right to provide or to offer service to all residents.

> within the confines of a major piece of legislation.[187]

Indeed, NATOA went so far as to say:

> [T]he requirement [of Section 623(d)] should not be interpreted to mean that the rate structure should be the same in each franchise area served by a cable system that serves multiple, contiguous franchise areas; the provision only requires that the rate structure <u>within</u> a franchise area be "uniform."[188]

Thus, the territory defined by the franchise -- not the territory defined by the physical reach of a cable system -- should be the fundamental geographic unit of cable rate regulation under the 1992 Cable Act.

Consumers who live in MDUs will suffer from a lack of competition unless Section 623(d) is interpreted to allow cable operators the freedom to negotiate individual contracts that may not be price-consistent within the entire franchise area. As Commenters cautioned in their initial comments, the rate discrimination provisions of Section 623(d) and (e) should not apply to individually-negotiated contracts with MDU owners.

For many years, MDUs have been served by MDS and by SMATV. Indeed, at the beginning of the last decade, it was not uncommon for MDUs to be served by one or the other of these multichannel providers even before a cable operator was franchised for the city in which the MDU was located. Despite this head start, these two industries historically have declined to compete with franchised cable operators on a customer-by-customer basis.

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[187]Massachusetts Cable Television Commission Comments at 39.

[188]NATOA Comments at 79-80 (emphasis in original).